No. 11803

In The United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

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PETITION FOR REHEARING

The appellant, John Barcott, by and through his attorneys of record, respectfully petitions this Honorable Court for a rehearing of the above entitled cause on the grounds and for the following reasons:

I.

The opinion of the Court indicates, without so declaring, that when a taxpayer has filed an income tax return which is presumed to be correct, a showing of assets acquired or expenditures made by him is sufficient to overcome the presumption of correctness of the return

and is prima facie evidence that all of his income has not been reported, thereby establishing the necessary corpus for criminal prosecution.

II.

The opinion of the Court indicates, without so declaring, that an increase in net worth for a given year is established by a mere showing that certain assets were acquired by the taxpayer in excess of his reported income for a certain year without the necessity of showing what the taxpayer's net worth might have been at the commencement of the taxable year.

III.

The Court's opinion indicates that it was based upon facts which were not in the case, namely, that at the time the appellant surrendered his stock in Fishermen's Packing Corporation it was "income producer."

IV.

Reaching the conclusion that the appellant's surrender of stock and the purchase of some items of furniture on the instalment plan was sufficient for the jury to infer that the appellant was impecunious prior to January 1, 1942, indicates that the Court has failed to consider that even on the Government's theory of the case the appellant was worth at least $53,000.00 as of December 31, 1941, making the above mentioned inference impossible.

V.

The opinion indicates that the Court has not applied the doctrine whereby all circumstances submitted in evidence must exclude every other hypothesis but that of guilt.

ARGUMENT

In analyzing the opinion of the Court in this cause, counsel for the appellant feel that they have failed to clarify the appellant's position, both as to law and as to facts. It was intended to show that the several bits of evidence introduced by the Government dwelt with only one phase of the crime, namely, criminal agency, and that no facts were introduced which proved the other element, to-wit, the corpus.

AS TO THE CORPUS

The appellant has made the following contentions in this case:

(1) That he has filed income tax reports which are presumed to be correct.

(2) That there has been no evidence introduced of any unreported income from the sources listed in his reports.

(3) That there has been no evidence of any unreported source of income.

It is conceded by the authorities and text writers that the corpus delecti consists of two elements: First, the body of the crime, and second, the criminal intent or agency. In this brief petition we quote only one definition from Vol. 1, Words and Phrases, Second Series, page 1066:

> "The 'corpus delecti' is made up, * * * says Mr. Best, "of two things: First, certain facts forming its

> basis; and, secondly, the existence of criminal agency as the cause of them." *State v. Rogoway,* 78 Pac. 987, 989, 45 Or. 601, 2 Ann Cas. 431 (quoting Best (Ed. 1883 Sec. 442).

An analysis of the facts shows that all of the Government's proof in this case goes to the second element only. There is no showing that the income tax statements filed by the appellant failed to include all of the income from the sources listed therein. The reports are presumed to be correct and there is no evidence of a single item of income received from the reported sources which was not included in the reports by the appellant. If an unreported source of income had been shown, the arguments of the Government and the opinion of the Court in this case would be appropriate, as then there would exist a corpus upon which all other evidence of intent, consciousness of guilt, etc., would have a basis upon which to operate. In our case circumstances offered to prove the *delict* operate only on other circumstances of a similar nature. Even if this evidence were increased a hundred fold over what was offered it would still go only to criminal agency and would fail to make a case without proof of the corpus.

If it is the ruling of this Court that the burden of proving the corpus of an income tax evasion case is met by showing that the taxpayer acquired assets or made expenditures in excess of the reported income for the given year, and that the presumption of correctness of an income tax return is dissipated thereby, it is sincerely requested that this Honorable Court clarify its opinion in this regard, for in matters as serious as these, no doubt or room for misconstruction should be permitted to exist.

AS TO THE NET WORTH

All of the cases cited to this Honorable Court pertaining to the admissibility of evidence of net worth indicated that a prerequisite to the introducion of such evidence was actual proof of the net worth at the commencement of the period. If it is the opinion of the Court that any increase in assets over reported income for a given year shall be deemed to be an increase in taxpayer's net worth, and that no other anchor, basis or foundation is needed, it is respectfully urged that the opinion of the Court be modified so as to clearly indicate this change and departure from previous decisions.

AS TO SURRENDER OF APPELLANT'S INCOME PRODUCING STOCK

On page 2 of the opinion the following appears:

> "The stock was an income producer. A dividend of 6 per cent was paid on it within 20 days after the surrender by appellant of a portion of the shares in payment of the note."

There was no evidence in the case which we can recall that showed appellant's stock to be an income producer prior to its surrender. We cannot see how the Court can say that had appellant possessed available funds at the time he would not have sold dividend paying stock to discharge an obligation on a note when there is no evidence that any dividend was ever declared prior to the sale. We earnestly submit that the Court was in error as to this fact, and by reason thereof an injurious inference was drawn from the evidence.

AS TO THE INFERENCE THAT APPELLANT WAS WITHOUT FUNDS PRIOR TO THE YEARS IN QUESTION

The Court said on page 4 as follows:

> "The jury were also entitled to draw from the evidence the inference that had appellant possessed available funds at the time he would not have sold dividend paying stock to discharge an obligation on a note or have purchased furniture on the installment plan."

The record in this case is replete with evidence showing that the appellant was far from impecunious prior to January 1, 1942. He had a bank account with the general average of $1,000; he was the owner of conditional sales contracts; owned his own home; owned his restaurant business; and was also possessed of a large quantity of United States Savings Bonds prior to 1941. According to the Government's own testimony he was worth at least $53,000 on December 1, 1941. We cannot conceive of the Court reaching the conclusion which it did in the foregoing quotation if it had considered the appellant's admitted net worth. Our failure to stress this fact in our previous briefs and arguments may well have been the reason for the Court's failure to consider it in analyzing this particular evidence. The fact remains, however, that when it is considered, it makes the Court's conclusion a practical impossibility, and a rehearing should be granted to the appellant in this regard.

AS TO THE CIRCUMSTANTIAL EVIDENCE INTRODUCED BY THE GOVERNMENT

Several items of evidence were introduced by the Government which were supposed to show circumstantially that the appellant was guilty of income tax evasion. We submit that each and every item of evidence listed below is just as consistent with innocence as it is with guilt, and that none of them were proper to be considered by the jury.

1. Possession of war bonds acquired during the years in question in excess of reported income for that year.

We believe it utterly impossible for any human agency to say that such a purchase can mean only one thing, to-wit, the purchase of bonds with current income. It seems incredible to say that such purchase could not have been from prior savings. Common knowledge tells us that in innumerable instances this is exactly what happened, which proves its consistency with innocence.

2. Surrender of stock and purchase of furniture on the installment plan.

We know of no rule for human behavior which invariably indicates that when a man sells stock (even dividend producing stock), or buys furniture on the installment plan, said man is without funds or assets with which to pay for them. The reasons for his so doing are multiple. He may wish to pay for his purchases out of future income. He may reason that savings expended are seldom replaced. He may wish to retain his present assets for

other purposes. If the Court will reconsider this evidence in the light of human experiences, we feel certain that many hypotheses will present themselves which are perfectly consistent with the appellant's innocence.

3. Entry into another safety deposit box.

We must agree with the Court that the time element involved in this transaction may lend a suspicious cast to the appellant's action. But convictions cannot be sustained on suspicions. Was it reasonable for the appellant to visit his box for legitimate purposes? It must be concluded that it was, even if the Court and jury believe it was for another purpose. Suppose the appellant entered his box to deposit or remove certain business papers, which is not an unreasonable supposition. The great injustice worked upon the appellant by allowing the jury to speculate as to the purpose of the entry apparent.

4. Changing small currency for that of large denominations.

It is admitted that one who was attempting to evade income taxes might use this method to reduce the bulk of his holdings. But this possibility does not foreclose all other reasonable possibilities. Distrust of banks has led to the lifetime practice of hoarding cash, in some instances. Those who make a practice of saving cash can and do conserve vault space by converting their savings into larger bills, but this does not make them dishonest. Many a safe deposit box has been opened in the process of probating an estate which revealed quantities of large denomination bills, without the slightest question of surreptitious acquistion thereof. This has been especially true in the cases of foreign born citizens. That a hypothesis

consistent with innocence exists, is sufficient to make the use of this type of circumstantial evidence inadmissible.

Webster defines "hypothesis" as "something not proved, but assumed or conceded for the purpose of argument." It is a mere supposition. The appellant did not have to prove his actions in the foregoing instances were innocent. It is enough that theoretically they could have been. This is the law's great protection (not only for this appellant, but for all of us), against conviction by promiscuous use of circumstances which may or may not prove guilt.

CONCLUSION

In conclusion, we submit that one inescapable fact presents itself in this case. That is, that the appellant filed income tax returns for the year in question which are presumed to be correct, contain the restaurant business as a source of income, and the returns as made stand unchallenged and unimpeached, without a shred of evidence that any of said returns is erroneous inasmuch as a single dollar. Circumstantial evidence of criminal agency has been offered but no evidence was offered to show the existence of any corpus upon which the circumstances can operate. To sustain a conviction the Court must find that in income tax evasion cases a corpus is established whenever the acquistion of assets is simply greater than the reported income for a given year. We have found no reported case which has gone to this extent. A rehearing on this qustion is respectfuly requested.

It is further submitted that the case also should be considered on the basis that the Appellate Court regarded it as a fact that the appellant's stock was income producing

when he disposed of it, as well as for the reason that the Court failed to consider that the appellant was worth a minimum of $53,000 when it reached the conclusion that it could be infered that the appellant was impecunious by reason of his sale of stock and purchase of some items of furniture on conditional sales contract.

Furthermore, a rehearing is requested to enable the Court to further examine into the circumstantial evidence submitted into the case for the purpose of testing it with the doctrine of hypotheses of innocence.

If, after a rehearing, this Court should adhere to its original decision, in order to prevent future confusion on a highly important and most serious question, it is requested that an opinion be delivered which sets forth the proposition that acquistion of assets in excess of reported income will overcome the presumption of correctness of a filed return and will establish a corpus for criminal prosecution. In this event it also earnestly requested that the opinion set forth the proposition that acquistion of assets in excess of reported income for a given year is regarded as an increase in the taxpayer's net worth, and no other basis or foundation is needed to support the inference.

Respectfully submitted,

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and
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